

1 UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF WISCONSIN

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4 UNITED STATES OF AMERICA,)
5)
6 Plaintiff,) Case No. CR 11-135
7) Milwaukee, Wisconsin
8 vs.)
9) August 13, 2012
10 ARVIND AHUJA,) 10:30 a.m.
11)
12 Defendant.) PAGES 218-281
13 -----

14 **TRANSCRIPT OF MOTION HEARING (VOLUME 3)**
15 BEFORE THE HONORABLE CHARLES N. CLEVERT, JR.
16 UNITED STATES CHIEF DISTRICT JUDGE, AND A JURY

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40 Proceedings recorded by computerized stenography,
41 transcript produced by computer aided transcription.



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P R O C E E D I N G S (11:00 a.m.)

THE COURT: Case No. 2011-CR-135, United States of America vs. Arvind Ahuja. This matter is before the court for oral argument. May we have the appearances, please?

MS. JOHNSON: Yes, Your Honor. On behalf of the United States we have John Sullivan, Melissa Siskind, I am Tracy Johnson, and Special Agent Geoffrey Cook.

THE COURT: Good morning to each of you.

MR. WEBB: Good morning, Your Honor. On behalf of the defense Dan Webb, the defendant Dr. Ahuja is present, Tom Kirsch, and Shannon Allen. We're all present.

THE COURT: Good morning to you as well.

I apologize for getting started later than planned, but I wanted to look at your briefs and consider the arguments that you have offered up for consideration today. Consequently, I've been pouring over your submissions and trying to ascertain whether or not all points of interest have been addressed.

It did come to my attention that in going over your briefs that there are a couple of points that need to be addressed, and one such point relates to the timing of the documents at issue, 69 -- Exhibit 69 and 71. Your submissions do not talk about when these documents may have been prepared.

Therefore, I'd like to hear from you inasmuch as timing does enter into the picture in determining whether or not these documents are admissible under the residual hearsay rule.

1 Does the government wish to be heard? Go ahead.

2 MS. SISKIND: Thank you, Your Honor. Your Honor, the
3 screen shots in Exhibit 69 and 71 are essentially a picture of a
4 moment in time of what the computer system looked like in India.

11:02 5 And if Your Honor looks at the screen shots, for example, the
6 first one that appears in Exhibit 69, Your Honor can see that
7 the bank record at issue here bears both a date and a time.
8 This one is the 9th of September 2006, at 2:09. The fact that
9 is clearly a snapshot of what the computer looked like on a
11:03 10 particular date and time, coupled with the fact that there is
11 both a date and time on here, strongly suggests that this
12 particular bank record, for example, was created when taken from
13 the computer system on September 9th, 2006 at 2:09. And the
14 other screen shot bank records at issue here similarly bear
11:03 15 dates and times that establish when they were created.

16 THE COURT: Does the defense wish to counter?

17 MR. KIRSCH: Yes, Your Honor. Your Honor, the reason
18 we didn't address this is because absolutely nothing has changed
19 in this regard from what the court said on Friday. And I have
11:04 20 the transcript from Friday's hearing, and the court on Friday,
21 at page 192 of the transcript, correctly concluded that the
22 government's evidence, including the screen shots and
23 Ms. Katju's testimony, the court correctly concluded that
24 Ms. Katju failed to show the time or times at which information
11:04 25 is input into the system.

1 Now, if Ms. Katju couldn't do it, clearly the
2 documents can't do it by themselves. And I think that's the
3 point the court is making this morning. Nothing has changed
4 since Friday in that regard. The government didn't address this
11:04 5 in their brief because there's absolutely no evidence, they have
6 none, as to the time or times at which the information is
7 inputted in the system.

8 The court continued: "It's notable that today
9 Ms. Katju mentioned that some information is input at the time
11:05 10 instructions are given by a bank customer. That testimony alone
11 does not establish that she has the requisite knowledge that
12 would allow the admission of the screen shots as business
13 records."

14 The court was absolutely 100 percent correct in that
11:05 15 holding. Nothing has changed between now and Friday. So, these
16 screen shots, coupled with Ms. Katju's testimony, do not
17 establish when these documents may have been prepared.

18 THE COURT: Does the government wish to respond?

19 MS. SISKIND: Only, Your Honor, that the documents do
11:05 20 bear dates and times. And Ms. Katju testified that, on an
21 as-needed basis, what information was needed from India, a
22 request would be made to the bank in India and someone in that
23 country would send a picture of what the HUB system looked like
24 to the representative office in New York.

11:05 25 And it is these screen shots bearing dates and times

1 in Exhibits 69 and 71 that HSBC located among its records at the
2 bank here in the United States and produced to the government.

3 We would suggest, Your Honor, that establishes they
4 were produced -- that they were prepared just as Ms. Katju
11:06 5 testified. Even though she did not have specific knowledge of
6 these screen shots, her testimony is very informative about how
7 screen shots generally were used by employees at the
8 representative office.

9 THE COURT: There are a couple of things that I have
11:06 10 considered this morning. One is, the testimony of Vandana
11 Katju. Ms. Katju testified respecting her work as an HSBC
12 employee in India; as an HSBC employee in New York; and as an
13 HSBC employee in California.

14 Among other things, she testified -- trying to find
11:07 15 what she said -- that she relied upon the HUB system to obtain
16 information respecting the accounts of HSBC clients. She added
17 that "If a client wanted something documented, we had to reach
18 out to HSBC-India; and if a client wasn't necessarily interested
19 in it being documented but the inquiry was complicated, then
11:09 20 they would refer to HSBC-India."

21 She added that "We wanted to see the screens
22 themselves directly to make sure that we were capturing the
23 information that they wanted correctly."

24 In response to the government's inquiry as to whether
11:10 25 or not HSBC-NRI Services wanted the information to be accurate,

1 she said: "We'd get these screens because we -- some of these
2 clients had multiple CDs and complicated accounts with us and
3 they wanted to make sure that we were looking at the screen and
4 giving them accurate information."

11:10 5 She also was asked: "Now, the HUB system, was that
6 something you personally used when you worked for the bank in
7 India?"

8 She said: "I did."

9 "When you were working in India did you rely on the
11:10 10 entries in that system in conducting your work at HSBC?"

11 She said: "Yes."

12 She was also asked: "Did you ever have any reason to
13 doubt the reliability of that system?"

14 Answer: "No."

11:11 15 Question: "And when you were working in the United
16 States and you were using screen shots that came from that
17 system, did you ever have any reason to doubt the reliability of
18 those screen shots?"

19 Her answer: "No."

11:11 20 Scott Maciejewski, the record custodian who testified,
21 indicated that he prepared a 902(11) records certification for
22 this case, and that the information he retrieved and provided
23 came from computer servers that hold HSBC e-mails.

24 He went on to say that "HSBC has a shared directory
11:12 25 which is basically a server where people can save records in a

1 shared directory for access within their department or with
2 their own computers as well as side files or hardcopies that are
3 kept on location or at archives."

4 He further testified that no later than January 1st of
5 2006, 100 percent of the e-mails that come through servers --
6 through the server -- is going -- no, ingoing and outgoing are
7 retained.

8 He furthered testified that screen shots are
9 maintained in some form in HSBC offices in the United States,
10 and added that they are retained either as attachments in
11 e-mails and possibly saved on the shared drive after that, as
12 well as printed out hardcopies.

13 He indicated also that HSBC has a policy entitled,
14 "HSBC-North America E-Mail Policy." That policy applies to HSBC
15 employees in the United States as well as in India.

16 He went on to verify the process utilized in
17 retrieving the records that were part of his certification --
18 that were covered by his certification, and noted that the IT
19 department of HSBC did a search which was restricted to the H+
20 server of HSBC which found e-mails that were the subject of his
21 certification.

22 He also testified that if it was provided with the
23 records, it was maintained on the HSBC Bank-USA server.

24 Now, the court's prior ruling that the documents --
25 various documents were not admissible under the business records

1 rule does not preclude a finding that the documents may be
2 admissible under the residual hearsay rule.

3 Additionally, the court notes that its earlier ruling
4 took into account Rule 803(6), and in particular sub (a), where
11:16 5 "a record of an act, event, condition, opinion, or diagnosis has
6 to be shown to be a record which was made at or near the time by
7 or from information transmitted by someone with knowledge."

8 Ms. Katju's testimony, which I referred to previously
9 in barring admission of the records under 803, did not address
11:17 10 whether or not the information was -- whether the record was of
11 information that was made at or near the time by someone with
12 knowledge. Now, however, the government has pointed out the
13 dates that are shown in the screen shots in Exhibits 69 and 70.
14 Moreover, as we have discussed, the screen shots were utilized
11:18 15 regularly by people in the NRI office as testified to by
16 Ms. Katju. The bank captured those screen shots, it saved those
17 screen shots, and bank employees utilized those screen shots to
18 provide what was deemed to be the actual information reflected
19 in the records of HSBC at particular times and on particular
11:18 20 dates. The requirements of 807 have, therefore, been met.

21 The court notes that there are circumstantial
22 guarantees of trustworthiness by virtue of the manner in which
23 these materials are transmitted, utilized and relied upon during
24 the regular business of HSBC here in the United States. These
11:19 25 documents do relate to something that is quite material in these

1 proceedings. The government has pointed out that it does not
2 have the ability to provide witnesses who could testify to the
3 particulars of how the information is physically captured and
4 input into the HUB system in India because those persons are
11:20 5 beyond the subpoena power of the government and clearly outside
6 the United States.

7 And lastly, the interest of justice would be served by
8 virtue of allowing this information -- I should say Exhibits 69
9 and 71 -- to be utilized in this case.

11:20 10 Now, the court further notes that we are pretrial and
11 the government, by virtue of its request last week for admission
12 of these documents under Rule 807, has given pretrial notice to
13 the defense. The defense has had a chance to be heard with
14 respect to the utilization of these exhibits. And it is also
11:21 15 apparent from the matters on file in this case and the
16 arguments, that the defense was aware of the government's desire
17 to utilize these materials during the course of the trial and
18 there is nothing that the government is proffering with respect
19 to these exhibits at this time that would unfairly prejudice the
11:21 20 defense with respect to these matters.

21 Hence, the government may utilize Exhibits 69 and 71
22 over the objection of the defense which will not be required to
23 reiterate its objection during the course of the trial. Its
24 objection is preserved to the extent that it has been made and
11:21 25 reflected in the submissions and arguments of counsel.

1 Is there anything further with respect to these two
2 exhibits?

3 MS. SISKIND: No, Your Honor.

4 MR. KIRSCH: Your Honor, I'd just like to make one
11:22 5 point of clarification --

6 THE COURT: Yes.

7 MR. KIRSCH: -- from the defense argument.

8 Your Honor, the court is relying on the date and time on the
9 screen shot. But as we discussed last week, I think the date
11:22 10 and the time on the screen shot is just -- could be the date and
11 the time the screen shot was printed. It says nothing about the
12 date and the time the information was input into the system.

13 THE COURT: That's correct.

14 MR. KIRSCH: Okay. I just wanted to make that
11:22 15 clarification. Your Honor, we --

16 THE COURT: It is what it is.

17 MR. KIRSCH: Okay. We have --

18 THE COURT: And I think that goes to weight and not
19 admissibility.

11:22 20 MR. KIRSCH: Okay. I just wanted to make the record
21 clear on that point, Your Honor.

22 There are -- now, Your Honor, because of the court's
23 Santiago ruling there are a multitude of exhibits that are
24 e-mails that I think the court has to consider under 803(6).

11:22 25 The government has never put on any evidence whatsoever that it

1 was the policy of HSBC to require the creation of e-mails of
2 this sort. We now get back to the telephone conversation versus
3 e-mail argument that we had at the beginning that the court had
4 reserved. But this now is very germane to these exhibits
11:23 5 because none of these exhibits will come in under the hearsay
6 exception. So the only thing the government is left with is
7 803(6).

8 They've put on no evidence -- and I can give the court
9 the exhibit numbers, but there are multitudes of e-mails in this
11:23 10 case that do not come in under 803(6) because the government
11 cannot establish -- all they can establish is that HSBC had an
12 e-mail policy that said generally use e-mails for business, but
13 says nothing about what was required to be recorded in an e-mail
14 which is the indicia of reliability. The whole point of 803(6)
11:23 15 is that if something is required to be reported or recorded,
16 that it has an indicia of reliability. But if you're just
17 sending e-mails between friends it does not have that indicia of
18 reliability just because it's written down.

19 And so we have to address -- I think we have to
11:24 20 address all of these e-mails because this could have significant
21 bearing on the government's proof at trial.

22 THE COURT: Does the government wish to reply?

23 MS. SISKIND: Yes, Your Honor. Absolutely.

24 Your Honor, based on the court's prior rulings on the
11:24 25 Santiago issue, the government no longer intends to introduce at

1 trial e-mails authored by bankers. The government may still
2 seek to introduce e-mails authored by the defendant as part of
3 an e-mail chain with bankers, but the government is no longer
4 seeking to admit those e-mails that are solely between bankers.

11:24 5 Your Honor --

6 THE COURT: What I would like to suggest is that the
7 defense and the government confer so that we can clearly
8 identify for the record those documents that the government is
9 not seeking to admit. And if there are any additional documents
10 as to which the defense has an ongoing objection, those can be
11 clearly identified for the record. All right?

12 MS. SISKIND: Yes, Your Honor.

13 THE COURT: Will it take you very long to do that?

14 MS. SISKIND: No, Your Honor. I believe over the
11:25 15 weekend we identified those exhibits that we still intend to
16 admit. We can retrieve those briefly and have a conversation.

17 THE COURT: All right. Please have your conversation
18 off the record and then we'll go back on the record and make
19 sure that we note precisely what documents are being offered
11:25 20 and as to those that are being offered those -- the subset of
21 documents as to which there is an ongoing objection.

22 But before we break, I'm curious about the testimony
23 you wanted to preserve and where we stand with regard to the
24 video deposition. I understand that there were some technical
11:26 25 issues that needed to be ironed out.

1 MR. SULLIVAN: Your Honor, we discussed this on
2 yesterday, Sunday. We discussed this yesterday on Sunday and
3 the defense did not agree to the use of a deposition. They have
4 filed their response. If we go to trial on Wednesday we
11:26 5 anticipate our direct examination of that witness is going to be
6 45 minutes or less. So if we do start on Wednesday then the
7 witness could testify on Wednesday and we wouldn't have an
8 appellate issue hanging over our heads. And so we will agree
9 that we will forego the deposition and just do it in front of
11:27 10 the jury the way it was intended to be. If that makes sense.

11 THE COURT: Makes perfect sense. As long as that is
12 something that you believe is an appropriate way to proceed I
13 don't have a problem with you offering, as you said previously,
14 live testimony, unquote.

11:27 15 MR. SULLIVAN: As opposed to bringing in a dead
16 person?

17 THE COURT: Precisely. All right, we'll take a short
18 break.

19 (Recess taken at 11:27 a.m., until 11:46 a.m.)

11:47 20 THE COURT: Counsel?

21 MR. KIRSCH: Your Honor, we've resolved I think our
22 differences except for with respect to three exhibits. We have
23 objections that remain to three exhibits.

24 THE COURT: All right. What are they?

11:47 25 MR. KIRSCH: They're 17, 35, and 38.

1 THE COURT: I they that 17 is DOJ - Kolb, 006506. At
2 the top it is headed by the name Andrea D., is that Heise,
3 H-E-I-S-E?

4 MR. KIRSCH: Your Honor, I think it's Heise, but --

11:48 5 THE COURT: Heise. All right. What's the objection?

6 MR. KIRSCH: Well, Your Honor, it's clearly hearsay.
7 The defendant was not cc'd on the e-mail. The e-mail was not to
8 him, it was not from him. There'll be no testify -- there'll be
9 no testimony that he's ever seen the e-mail, that he ever knew
11:48 10 of the e-mail. And I think the government is going to call Mark
11 Miller and perhaps Andrea Heise, and the admission of this
12 e-mail is clearly hearsay without a hearsay exception and it
13 would -- to offer this during Mark Miller's testimony would just
14 be bolstering. They can't -- there's no exception to this --
11:48 15 there's no hearsay exception that would apply to an e-mail like
16 this on which the defendant never even saw it.

17 THE COURT: I'd like to hear what the government plans
18 to do with Exhibit Number 17 and why, if at all, it believes the
19 exhibit is admissible.

11:49 20 MS. SISKIND: Your Honor, Mark Miller will testify
21 that this e-mail was created and maintained in the ordinary
22 course of his accounting firm's business.

23 This is -- this e-mail is tantamount to the accountant
24 notes that the Eighth Circuit found were admissible in the
11:49 25 Hoselton case which we cited in our papers. Mark Miller will

1 testify that this e-mail was printed out and kept within his
2 work papers along with the other work papers that went into the
3 tax returns he filed and prepared for the defendant. That takes
4 care of the hearsay exception for the e-mail itself.

11:49 5 The government will be using this e-mail in part for
6 one particular statement of the defendant recounted within this
7 e-mail. And so the outer hearsay exception would be the
8 business record exception. And as far as the inner hearsay for
9 the defendant's statement, that would be non-hearsay under
11:50 10 801(d) (2) (A) .

11 And, Your Honor, I'm referring to the paragraph that
12 begins "Arvind will follow up on a couple bank or brokerage
13 accounts."

14 THE COURT: The admissibility of this is going to
11:50 15 depend primarily upon the testimony of this witness, correct?

16 MS. SISKIND: Yes, Your Honor. He will lay the
17 foundation.

18 THE COURT: I'd like to hear more from the defense as
19 to why the statement -- I should say the statement that you just
11:51 20 referred to, which begins with "Arvind will follow up," should
21 not be admitted.

22 MR. KIRSCH: Well, Your Honor, "Arvind will follow up"
23 is not a statement of the defendant. It's just not. So it
24 can't be admitted as non-hearsay as a statement of the
11:51 25 defendant.

1 And to admit the rest of the e-mail I think is just
2 improper bolstering of the witness. We can see what the witness
3 is going to testify to. He's going to hit the stand and he's
4 going to testify. And then to say "oh, we have a document that
11:51 5 supports your testimony" is just improper bolstering.

6 But certainly "Arvind will follow up" is not a
7 statement. It's not a statement of the defendant.

8 THE COURT: I would agree. This is an impression that
9 the writer apparently has as to what, if anything, the defendant
11:51 10 will be doing. He can certainly testify to what he knows. But
11 I don't see how this statement is one that would -- should be
12 admitted as an accountant's notes with respect to anything that
13 the accountant has to do in order to prepare the material he's
14 working on.

11:52 15 Perhaps the government can say something more, but at
16 this stage I have to agree with the defense.

17 MS. SISKIND: Nothing further at this time,
18 Your Honor.

19 THE COURT: 35.

11:52 20 MR. KIRSCH: Your Honor, I think the other ones are
21 more straightforward. 35 and 38 are both the same. They're
22 e-mails that were sent by HSBC bankers to an e-mail address that
23 was associated with the defendant. But the defendant wasn't the
24 only one that used the e-mail address, and that's clear from
11:53 25 government e-mails that they struck out.

1 For instance, if you look at 35, that's not the
2 defendant's e-mail address at all. And the e-mail is from
3 Ankush Tandon to -- the defendant does not use that e-mail
4 address and it says "You are welcome. We also got confirmation
11:53 5 that the credit card PINs would be delivered to the UK address.
6 Enjoy your holiday."

7 That's not admissible for any purpose. That's a
8 hearsay statement by Ankush Tandon who is not a co-conspirator.
9 There's no exception to the hearsay rule for that reason, just
11:53 10 as there's no exception to the hearsay rule to the dozens of
11 e-mails that the government's already withdrawn.

12 So 35 has to go. And 38 -- although it's addressed to
13 Dr. Ahuja -- so 38 is a little different than 35 because it's
14 actually addressed to Dr. Ahuja. It's sent to a different
11:53 15 e-mail address, natasha2@bloomberg. But, again, this is a
16 statement of Priti Dhanani, it's not a statement of the
17 defendant, and it is a hearsay statement that does not fall with
18 any of the hearsay exceptions for the same reasons that the
19 government withdrew the co-conspirator hearsay statements and
11:54 20 the reason that the government withdrew the other 803(6) e-mails
21 that are just between the bankers. They can't prove that this
22 is a business record. It's not a statement of the defendant.
23 And so both 35 which they can't even establish was sent to the
24 defendant, and 38, need to go because they're hearsay with no
11:54 25 applicable exception.

1 THE COURT: All right. Let's hear from the
2 government. And would you please start with telling me whether
3 or not you can show that this was indeed sent to the defendant?

4 MS. SISKIND: First, Your Honor, for the e-mail
11:54 5 address natasha2@bloomberg.net in Exhibit 38. Ramit Bhasin will
6 testify that that was a e-mail address he frequently used to
7 correspond with the defendant. And the issue of whether someone
8 else may at sometimes also have used that e-mail address goes to
9 the weight the jury should give to this exhibit and not to its
11:55 10 admissibility.

11 As to the e-mail address aahuja3803 --

12 THE COURT: Well, let's first talk about whether or
13 not you will, through testimony that you will be providing
14 before you offer Exhibit 38, establish anything with regard to
11:55 15 the e-mail address.

16 MS. SISKIND: Yes, Your Honor.

17 THE COURT: All right, go ahead.

18 MS. SISKIND: Ramit Bhasin is intended to be the
19 government's first witness at trial. He will testify before
11:55 20 this e-mail is offered into evidence. And he will testify that
21 he had frequent e-mail communication with the defendant
22 utilizing the e-mail address natasha2@bloomberg.net.

23 THE COURT: All right. What else will you show
24 respecting Exhibit 38?

11:56 25 MS. SISKIND: Exhibit 38 is not offered for the truth

1 of the matter asserted. It is offered to show the defendant's
2 state of mind, and specifically his knowledge with respect to
3 whether he had foreign bank accounts.

4 In order to sustain our burden of proof on the charges
11:56 5 in this case, we need to prove that the defendant knew he had
6 interest income earned from foreign bank accounts. And we
7 anticipate that one of the defenses in this case might be that
8 the defendant did not know these were foreign bank accounts and
9 merely thought they were foreign investments or something else
11:56 10 of that nature.

11 E-mails from bankers that were sent to the defendant
12 on the subject of foreign bank accounts goes to his knowledge
13 about the existence of those accounts. And in this particular
14 e-mail 38, the subject is bank statements for the defendant's
11:57 15 HSBC-Jersey accounts.

16 THE COURT: Is the same true with regard to 35?

17 MS. SISKIND: Yes, Your Honor. This one relates to
18 credit card PINs for the HSBC-Jersey account. It is directed to
19 an e-mail address that is associated with the defendant.

11:57 20 If the court looks at Exhibit 29, there is another
21 e-mail from the defendant using that same e-mail address. And
22 even though Mr. Kirsch indicated last week that that was an
23 e-mail address jointly used by Arvind Ahuja and Namrata, the
24 court can see that when the e-mail comes from aahuja3803@aol.com
11:57 25 in Exhibit 29, the e-mail is signed "let me know, thanks, AA."

1 And the government would submit that establishes that the
2 defendant utilizes the e-mail address that is on Exhibit 35.

3 THE COURT: The defense objection is overruled. I'll
4 allow the admission of each.

11:58 5 MR. KIRSCH: Your Honor, can I make just one statement
6 for the record?

7 THE COURT: Go ahead.

8 MR. KIRSCH: I didn't respond. The government argued
9 that they're not being offered for the truth of the matter
10 asserted. Then they're irrelevant. The government can't show
11 that Dr. Ahuja ever saw these e-mails, that Dr. Ahuja ever read
12 them, and it would be unfair for the government to be able to
13 argue to the jury that just because they were sent they should
14 go to prove Dr. Ahuja's state of mind.

11:58 15 They might be able to prove Priti Dhanani's state of
16 mind and Ankush Tandon's state of mind, but they do nothing to
17 show the defendant's state of mind and, therefore, they're
18 irrelevant, if that's the basis for the government's admission
19 of these documents.

11:59 20 THE COURT: Well, he did not have exclusive use of the
21 e-mail address.

22 MR. KIRSCH: Correct, Your Honor. And that's borne
23 out by the document. I never said that he never used the e-mail
24 address. I've been clear from the beginning on that. It's a
11:59 25 shared e-mail account. He doesn't have exclusive -- but to

1 allow them to put these up in front of the jury and say the
2 defendant knew certain things would be improper because they
3 have no proof of that. And that's the critical -- they have
4 absolutely no proof of it.

11:59 5 (Cellphone interruption.)

6 THE COURT: No telephones are allowed to be on in this
7 courtroom. It is my practice to retrieve all phones that ring
8 in this courtroom.

9 Would the bailiff retrieve the phone, please. There
12:00 10 are two signs, one is on the outside door, one is in the
11 hallway, advising that telephones are not to be utilized in the
12 courtroom.

13 Does the government wish to respond to the last
14 comment?

12:00 15 MS. SISKIND: Yes, Your Honor. The e-mail on its face
16 goes to the defendant's state of mind. The issue of whether he
17 actually ever saw either one of these e-mails is an issue of
18 weight and not admissibility. Certainly the defense can call
19 their client, they can call his wife, they can call other
12:00 20 people --

21 THE COURT: Well, we're not going to suggest that the
22 defense must call the defendant.

23 MS. SISKIND: Of course not, Your Honor. They could
24 call other witnesses familiar with the fact that other people
12:01 25 utilized this e-mail address and then argue to the jury that

1 because other people sometimes use this e-mail address it can't
2 be attributed to the defendant or to his state of mind. But on
3 the face of this e-mail, it was sent to an e-mail address
4 utilized by the defendant and it goes to his state of mind.

12:01 5 THE COURT: So the government is not conceding that
6 this e-mail address is one that the defendant uses along with
7 other people. You're suggesting that the defense has to come
8 forward with testimony that this is a shared use account.

9 MS. SISKIND: Certainly the defense has no burden.
12:01 10 But the government will put on evidence that the defendant has,
11 on multiple occasions, utilized these e-mail addresses.
12 Certainly the defense even without putting on a case can argue
13 the inference that we have not proven that the defendant had
14 exclusive control of this e-mail address. I don't think we'll
12:02 15 be able to prove that he had exclusive control of this e-mail
16 address. But we'll be able to present facts to the jury from
17 which they can conclude, if they so choose, that he received
18 these e-mails.

19 MR. KIRSCH: Your Honor, before the government gets to
12:02 20 the issue of weight they've gotta have some -- even a scintilla
21 of evidence regarding admissibility. They can't just stand
22 behind the, well, Judge, let's throw it in front of the jury and
23 let's see what they -- the government can make any argument they
24 want or the defense can make any argument they want, they can
12:02 25 call their client, they can call any witness they can't, we can

1 argue what we want and the defense can argue what the defense
2 wants. That is not -- that's not the test for admissibility,
3 and that's exactly what they're suggesting to the court.

4 THE COURT: But they have indicated that there will be
12:02 5 testimony that your client has utilized this e-mail account.
6 And by virtue of that testimony and this exhibit showing a
7 communication sent to the account -- an account used by your
8 client, the government can attempt to demonstrate that your
9 client had certain information that would provide a support for
12:03 10 one of the elements of the crime charged.

11 I will consider this a little more. Tentatively, as I
12 said, I was ruling that the government could admit the exhibit.
13 But I will give it some additional thought and let you know as
14 soon as I can.

12:03 15 MR. KIRSCH: Thank you, Your Honor.

16 THE COURT: Is there anything else?

17 MR. KIRSCH: Yes, Your Honor. There's one more
18 evidentiary matter that I think we need to discuss which has to
19 do with the screen shots and possible redactions to the screen
12:04 20 shots.

21 The government in their brief, one of the reasons --

22 THE COURT: Are you talking about, again, 69 and 71?

23 MR. KIRSCH: 69 through 71.

24 THE COURT: All right.

12:04 25 MR. KIRSCH: So one of the reasons the defense

1 objected to the documents coming in is that it's the only
2 evidence that the government has.

3 If you look at the screen shots. If you take -- I'll
4 just give you an example. If you take the second page of -- I'm
12:04 5 sorry, the third page of Government Exhibit 69, which is Bates
6 stamped HSBC-DOJ 27690. Right up at the top it says "account
7 number." And then it lists various accounts.

8 And what the government's gonna do, because they made
9 this perfectly clear in their brief on 807, what the government
12:04 10 is going to do is try to use these exhibits in an impermissible
11 way. They're going to try to use these exhibits to establish
12 that Dr. Ahuja had foreign accounts and that Dr. Ahuja knew that
13 he had foreign accounts.

14 But that is entirely unfair, even based on the
12:05 15 government's own exhibit. This is part of the problem with
16 those screen shots. If the court now goes to Government Exhibit
17 82, this is a letter signed by the defendant. And you see,
18 Your Honor, the exhibit -- or, I'm sorry, the letter signed by
19 the defendant says "CD number" and then it lists all of these
12:05 20 different CD numbers.

21 But the government wants to use the screen shots in
22 Government Exhibit 69 to argue that these were account numbers,
23 and the defendant thereby knew that he had foreign accounts.
24 But there's absolutely no evidence that the defendant ever saw a
12:05 25 single screen shot.

1 In addition to our earlier arguments which I'm not
2 going to repeat to the court, I think that at a very minimum --
3 I mean, you know we don't think the screen shots should come in
4 to begin with. But at a very, very minimum the account number
12:06 5 has to be redacted.

6 The inquiry line where it says "inquiry by customer"
7 up at the top has to be redacted. The court has relied on the
8 testimony of Ms. Katju, but Ms. Katju has never ever reviewed
9 these records. So the court is admitting documents based upon
12:06 10 the testimony of a witness who said as far as she knew the
11 exhibits could be in Spanish or in German.

12 So although she testified that she relied on screen
13 shots, she never testified that she relied on these screen
14 shots. And that's a major problem in this case. Because when
12:06 15 they start putting in documents that says "inquiry by customer,"
16 and we have absolutely no idea who made this inquiry -- there
17 will be no testimony whatsoever except the face of the document
18 that says the inquiry was made by Arvind Ahuja. There's no
19 testimony in the record from Ms. Katju or from anybody else at
12:07 20 HSBC that this line on the screen shot is correct or even
21 remotely correct. There's no testimony as to when the screen
22 shot was accessed or when it was created.

23 The page numbers. If the court looks at the page
24 numbers, just the sequential numbering of the Bates numbers of
12:07 25 the pages, they're all off. I mean, they're not sequential in

1 any way. So I don't know what these are. And now we've got
2 them coming in evidence.

12:07 3 THE COURT: One second. Let me make sure I know what
4 you're referring to when you say "these" page numbers and
5 "these" screen shots.

6 MR. KIRSCH: I'm sorry, Your Honor. I'm not being
7 clear. On Exhibit 69 if you look at the first screen shot that
8 the government submits is 27689. Then 27690. 27691. But then
9 we go to 27783. 27784. 27785. 27786. And then 27727. Then
12:08 10 27728. You see the pattern. 27729. 27720.

11 So we've got documents that are coming in evidence,
12 based upon the testimony of a witness who has never ever seen
13 these documents, under the residual hearsay rule. But we don't
14 know, and we'll never know, who made the inquiry for the
12:08 15 creation of these screen shots. We don't know and we'll never
16 know when the information was put into these screen shots as the
17 court ruled on Friday. We'll never know that Dr. Ahuja ever saw
18 these screen shots because he didn't.

19 The government wants to use these screen shots for an
12:08 20 improper purpose and argue that they were account numbers when
21 Dr. Ahuja clearly believed from other exhibits that they were CD
22 numbers.

23 And, Your Honor, I'm just -- I just -- I make the
24 motion in limine, but I'm just concerned that the way the
12:09 25 government's gonna use these we're headed down the path for a

1 mistrial based upon these particular documents. Because once
2 the government makes the arguments that it wants to make from
3 these documents, I think that's where we're gonna be,
4 Your Honor.

12:09 5 And that sort of sums up at least some of the
6 objections. And then in our papers we've pointed out that there
7 are e-mails from bankers. We cited in our papers and we
8 attached them to our papers two e-mails that suggest that the
9 screen shots may not even be accurate.

12:09 10 THE COURT: Please respond.

11 MS. SISKIND: Your Honor, the defense is
12 misrepresenting the purpose for which the government is offering
13 these screen shots.

14 The court can see, for example, Exhibit 69, the very
12:10 15 first page of the exhibit is a summary chart. Special Agent
16 Geoffrey Cook for 81 and 79 will testify that in calculating
17 what the high balance was in the defendant's HSBC-India accounts
18 for each of the years at issue he relied on the screen shots.

19 For purposes of our trial exhibit we only exhibited
12:10 20 those screen shots that he actually used in making that
21 calculation. And that's why there's gaps in the Bates numbers.
22 There are more screen shots that were produced to the defense in
23 discovery that fill in those gaps. But there was no need to
24 show the jury irrelevant screen shots, and so we only selected
12:10 25 those that Agent Cook used when doing his calculations.

1 The same holds true for Exhibit 71. The first page of
2 that exhibit is a summary chart. Agent Cook will testify that
3 the screen shots following that summary chart are only those
4 screen shots he relied upon in making a calculation of
12:11 5 unreported interest income. Irrelevant screen shots were
6 excluded. We're not trying to show other screen shots to the
7 jury that do not underlie his calculations. So that explains
8 the gap in Bates numbers.

9 As far as the line on the record "inquiry by
12:11 10 customer," we have no objection to redacting that line. That's
11 not what we're offering these records for. The records were
12 being offered like any other bank records: to prove their
13 contents, to prove unreported income, to prove high balances.
14 The fact -- what it may mean when it says "inquiry by customer,"
12:11 15 the government does not intend to rely on that statement and has
16 no objection to redacting that line off of each and every screen
17 shot.

18 THE COURT: All right. That should be done.

19 MR. KIRSCH: Your Honor, can I make a comment? I want
12:11 20 to read -- I want to read -- I just want to read a sentence from
21 the government's brief that they filed last night at 10:00
22 o'clock regarding the importance of these screen shots and what
23 the government is intending to use these screen shots for. And
24 I don't --

12:11 25 THE COURT: One second. Hold up, please.

1 MR. KIRSCH: Yes, Your Honor.

2 (Brief pause.)

3 THE COURT: I'm trying to pull up information on my
4 computer.

12:12 5 MR. KIRSCH: Your Honor, I'm looking at page 16 of the
6 government's filing.

7 THE COURT: Page 16?

8 MR. KIRSCH: Yes, Your Honor. Should I continue?

9 THE COURT: Go ahead.

12:13 10 MR. KIRSCH: Your Honor, in the middle of the page
11 after materiality, the materiality comes after -- page 13, 14,
12 and 15 they set forth what they want to use and they try to
13 argue that they are accurate. And, Your Honor, there are
14 inaccuracies in their tables. Their very tables are inaccurate.

12:13 15 And I can point the court how. They count some CDs
16 twice. They have dates wrong. There are numerous inaccuracies
17 in the table which reflect -- I'm just afraid when they call
18 Agent Cook we're gonna have a mistrial.

12:14 19 But, in any event, materiality, in the middle of that
20 paragraph, they cite the correct standard that starts: "To
21 convict the defendant of failing to file a Report of Foreign
22 Bank and Financial Account, FBAR, the defendant must prove that
23 the defendant must have a financial in or signature or other
24 authority over a foreign bank account."

12:14 25 Then I go to the negligence sentence: "Accordingly,

1 the government must prove that: 1. The defendant had one or
2 more foreign bank accounts."

3 And then you go to the next paragraph, Your Honor, and
4 the government tells you exactly how they're gonna use the
12:14 5 screen shots, when they write:

6 "The HSBC bank records establish all of these facts.
7 In addition to bearing the defendant's name, these records also
8 contain bank account numbers that match the account numbers
9 listed on letters signed by the defendant. This establishes
12:14 10 that the defendant had bank account in India with HSBC and the
11 defendant was aware of the existence of those accounts."

12 That's exactly what these screen shots do not do. And
13 the problem is, when they call Agent Cook, and Agent Cook's
14 gonna testify and talk about the contents, and they're gonna ask
12:15 15 him, he made calculations based on the screen shots, he's not
16 going to be able to say one word about the accuracy of these
17 screen shots. And even if they call Ms. Katju, Ms. Katju is
18 gonna say I've never seen these documents. I've never seen
19 them.

12:15 20 So now we've got a critical piece of evidence coming
21 in which I submit to the court is unreliable. And there are, in
22 addition to falsely suggesting that CDs were account numbers on
23 the government's charts on page 12, 13, and 14, they have --
24 they count the same CD twice in one instance. They have -- they
12:15 25 have dates wrong. They have maturity amounts wrong. And you

1 just -- the problem, Your Honor, is you can't follow the screen
2 shots. And certainly Agent Cook is never going to be able to
3 testify that he follows --

4 THE COURT: Give me an example of what you're
5 referring to as an inaccurate entry.

6 MR. KIRSCH: Well, Your Honor, on line 12 on page --
7 I'm sorry, on page 12. First of all, the government cites
8 Government Exhibit 20. And they want to use this -- they want
9 to use Government's Exhibit 20, which I can't even read those
10 exhibits, but they want to try to use those exhibits to
11 establish that Dr. Ahuja knew he had accounts and they want to
12 combine those with the screen shots.

13 But Exhibit 20 refers to "fixed deposits," which do
14 not mean accounts. They're not synonymous with accounts.

15 Then, the government uses Government Exhibit 20 and
16 Government Exhibit 29. And in Government Exhibit 29 on their
17 chart, they have 6/13/08. That's not right, it's 6/13/06. They
18 have an amount of \$1,820,500. But on the preceding line which
19 says Government's Exhibit 20, and then they have a date of
20 8/2/05, and they have an amount of a million dollars, that's
21 wrong. That amount is actually I believe 1,820,500. So they've
22 transposed the numbers in their first line and their second
23 line.

24 And then what happens is I believe the second line and
25 the third line is the same -- it's the same thing. And they've

1 counted it twice. That's what I think happened.

2 THE COURT: Is this Exhibit 20 and Exhibit 29?

3 MR. KIRSCH: Exhibit 20 and Exhibit 29. So you first
4 look at Exhibit 20 which is extremely difficult to read. But if
12:17 5 you look at the third page of Exhibit 20, which is
6 HSBC-DOJ-027701, it talks about a maturity date of June 12,
7 2006. And then you go to 29 --

8 THE COURT: One second.

9 (Brief pause.)

10 MR. KIRSCH: I think that's June 19th. I'm not even
11 sure. The government has in their chart June 13th, but I can't
12 read that document, Your Honor, and I don't know that anybody
13 can read it. For the record, it's a letter dated August 9th, it
14 looks like 2005, to the manager, in a place called Mauritius.
12:18 15 It's M-A-U-R-I-T-I-U-S. And it says, "dear sir," and in the
16 first line it says "I have placed in amount of U.S. dollars,"
17 and it looks like 1.820 million, on June 17, and I can't read
18 the year. But it looks like it says "a maturity date of June,"
19 and I can't read, it looks like 19, 2006.

12:19 20 THE COURT: Are you referring to Exhibit Number 20 at
21 Bates 027700?

22 MR. KIRSCH: 01, Your Honor. The next page.

23 MS. SISKIND: Your Honor, there are some typos in the
24 chart, we concede that. But I don't know if that goes to the
12:19 25 underlying issue here.

1 MR. KIRSCH: Your Honor, I don't think they're typos.
2 I mean, I think I'm pointing out these inaccuracies now and
3 they're not typos. They're very difficult. Under Rule 403 if
4 nothing else these screen shots should be prohibited. Because
12:19 5 the court now understands I think the importance of these
6 documents, but they're just not reliable. And what the
7 government's gonna try to do with the agent --

8 THE COURT: Hold up, please.

9 (Brief pause.)

12:20 10 THE COURT: Go ahead.

11 MR. KIRSCH: Your Honor, now, if you look at that
12 document and then you compare it to 29. In 29 there's a
13 question "Is there a CD due June 14th? Thanks. Let me know.
14 AA."

12:20 15 And then there's a response from Ankush Tandon, at the
16 top of the page it says, "There is one deposit of U.S. dollars
17 1.8205 million that is maturing on June 19th, 2006. Please let
18 me know what is to be done."

19 Now, the government has -- the government on their
12:21 20 chart in their brief they have Government Exhibit 29. Then they
21 cite a date of June 13th, 2006. I don't know what date -- or
22 2008. That '08 is probably a typo. I don't know what June 13th
23 refers to. But, Your Honor, I submit that the 1.8205 million
24 that they cite in 29 may or may not be the same thing that they
12:21 25 cite in 20.

1 But then they go to the screen shots, and they've got
2 two different pages of screen shot that they cite. And,
3 Your Honor, I mean, it's so confused that they can't even get it
4 right on the table that they filed over the weekend and they
12:22 5 want the court to admit these documents under 807 because they
6 say they're reliable.

7 THE COURT: Well, the reliability of the chart is not
8 at issue with respect to the admissibility of the screen shots.

9 MR. KIRSCH: I agree, Your Honor, but I think that --
12:22 10 what I'm saying is I think that the government -- I think if you
11 look at the government's chart, the errors in the government's
12 chart demonstrate the unreliability of the screen shots. It's
13 the same thing if you look at page 13 of their brief. And on
14 page -- I'm sorry. I'm getting ahead of myself.

12:22 15 MS. SISKIND: Your Honor, all these demonstrate is
16 that we made a mistake when making a chart for the court last
17 night. They do not demonstrate anything about the screen shots
18 or Agent Cook's testimony at trial.

19 THE COURT: Let him finish, please.

12:22 20 MR. KIRSCH: Your Honor, if you go to 13. On page 13
21 they have -- they're using Exhibit 82, which refers to CD
22 numbers, and they're using that I say correctly here in certain
23 respects.

24 THE COURT: One second. Exhibit 82 on page 13 of the
12:23 25 brief?

1 MR. KIRSCH: No. Page 13 of their brief and then
2 Exhibit 82.

3 THE COURT: I see -- I don't see --

4 MR. KIRSCH: Down at the bottom. So there's a
12:23 5 paragraph in the middle of the page that's in prose, Your Honor.
6 It says Government Exhibit 82.

7 THE COURT: Okay. All right. Okay.

8 MR. KIRSCH: So they use 82 to create the chart. But
9 if you look at 82, what 82 does is it has certain CD numbers and
12:23 10 maturity dates. And then they use their chart on page 13 and 14
11 and 15 of their brief to add principal, principal in India
12 rupees, principal in U.S. dollars, and then they cite to a
13 screen shot.

14 THE COURT: All right.

12:24 15 MR. KIRSCH: But then what they do, on page 16, when
16 they're discussing why these screens -- that's where you get to
17 page 16 where they're discussing what is so important about
18 these screen shots. They transposed these from CDs to foreign
19 bank accounts. And so they're using these screen shots which --
12:24 20 they're using these screen shots in an entirely inappropriate
21 way.

22 I mean, they say the screen shots establish that the
23 defendant had bank accounts in India with HSBC, and the
24 defendant was aware of the existence of those accounts. These
12:24 25 screen shots established nothing like that, Your Honor. Nothing

1 like that. And the problem is, we have now got documents that
2 are coming into evidence under Rule 807 that we submit are not
3 reliable under 807 because there's inaccuracies in the
4 documents, and we point that out in our -- we have two e-mails,
12:25 5 Your Honor, that we attached to our papers last night that
6 suggests that screen shots could be inaccurate. And we've got a
7 witness -- a records custodian, this Ms. Katju, who has never
8 seen these documents. And now we've got an agent who is going
9 to testify --

12:25 10 THE COURT: Well, Ms. Katju wasn't the records
11 custodian. It was Mr. Maciejewski.

12 MR. KIRSCH: Well, I don't even think the government
13 offered his testimony. I think the government offered his
14 testimony on the e-mails. But I don't think -- and the fact
12:25 15 that these things came from HSBC servers. But they did not
16 offer his testimony -- he's never seen these screen shots
17 either.

18 But we've got -- what we've got, Your Honor, right now
19 are screen shots that e-mails from HSBC bankers attached at
12:25 20 Exhibits D and E to our brief. HSBC bankers suggest that screen
21 shots may be inaccurate. We've got a custodian who has never
22 seen the screen shots. And we've got an agent who has tried to
23 interpret the screen shots and has made mistakes in doing so.

24 And that's the record that the government's gonna use
12:26 25 to try to convict Dr. Ahuja. And that's why we suggest that

1 these screen shots should be out altogether under Rule 807, but
2 even if they were coming in they have to be severely redacted.
3 So the government --

12:26 4 THE COURT: Well, at the very least they are to be
5 redacted to mask any reference customer inquiry. Now, what else
6 should be redacted? I've already ruled with regard to
7 admissibility.

8 MR. KIRSCH: Your Honor, account numbers should be
9 redacted. The date on the screen shot should be redacted.
12:26 10 There's no evidence and nobody will be able to testify as to
11 whether or not that's the date the screen shot was printed,
12 whether that's the date the information was requested, whether
13 that's the date the information was inputted. All those things
14 should be redacted.

12:27 15 So, we've got "inquiry to customer" should come out,
16 account numbers should come out, and the date on the screen shot
17 should come out, at the very least.

18 THE COURT: Let's hear about account number first.

19 MS. SISKIND: Well, Your Honor, they are the account
12:27 20 numbers. The fact that they may also refer to CDs doesn't
21 change the fact that the bank in this record is referring to it
22 as an account number. I didn't make that up. It's what the
23 bank is calling these numbers in a record.

24 The fact that they are actually referring to -- that
12:27 25 each sub-account is actually a CD still doesn't change the fact

1 that the bank in this record is calling these things account
2 numbers.

3 THE COURT: All right.

4 MS. SISKIND: As to the date on the record, that is an
12:27 5 essential piece of information on these records because that is
6 what enabled Special Agent Cook to determine which records were
7 relevant for determining high balances and interest income for
8 each year. If you take the date off, then there is really no
9 relevance to the document whatsoever because it's impossible to
12:28 10 tell what year they relate to for purposes of proving unreported
11 income and high balance. So the date is an essential piece of
12 information on here, account information --

13 THE COURT: The question is not whether or not the
14 date is an essential piece of information, the question is
12:28 15 whether or not the date should be masked because of some lack of
16 materiality or, alternatively, lack of proof.

17 MS. SISKIND: Your Honor, first I would submit the
18 date is material, and I can't think of any reason why the date
19 should be masked. The record is a picture of a moment in time
12:28 20 on a computer. The date is part of that record. I can think of
21 no basis under which that date should come off.

22 Inquiry by customer is different because that bears on
23 an issue as to the defendant's state of mind and what exactly
24 that means. But the date is what it is, and the date is part of
12:29 25 this computer record and should remain there.

1 MR. KIRSCH: Your Honor, if I can address the date
2 issue. In light of what the government's just said I would
3 renew our motion under Rule 807 and I will tell the court why.
4 The court started the proceedings today -- and we can look at
5 the transcript for this -- the court started the proceedings and
6 came out and asked a very important question: "When were these
7 documents prepared?" And the government said, "Well,
8 Your Honor, if you look at the screen shot it says September 6,
9 2009."

10 And I then argued at the very end because I wanted to
11 make this point again because I knew how important the court's
12 question was. I said, Your Honor, the government pointed to the
13 date on the screen shot, but it doesn't say anything about when
14 the information was -- it doesn't say -- all they can do is
15 point to the date of the document. It doesn't say whether it
16 was the date the document -- the information was requested,
17 whether the date the document was inputted, whether it was the
18 date the screen shot was created. We don't know what that date
19 means. We do not know.

20 And now the government has suggested to the court --
21 that is a huge issue. And now the government suggests to the
22 court, well, that's the relevance of the documents, the date.
23 And the court -- and the court correctly recognized Ms. Katju.
24 There has been no testimony regarding what this date means.
25 We're just guessing. And now the government has said, well,

1 Judge, that's the whole -- that's it, that's the whole
2 importance of the record, and we're just guessing as to whether
3 that date means the date the information was reported to HSBC,
4 the date the information was recorded in the screen shot, the
12:30 5 date the screen shot was requested by the customer or by
6 somebody in the HSBC in New York, or the date the screen shot
7 was permitted -- or printed. So off the top of my head I can
8 think of four things that that date might mean. And the
9 government just said that's our whole relevancy argument, is the
10 date, and we don't know what the date means.

11 They said that -- that was the first -- the first
12 words -- I think the first words out of the court after good
13 morning were when were these documents prepared. And we can
14 look at the government's response, they don't know. And now the
12:31 15 government's conceded without that information the documents are
16 not relevant.

17 So we would renew and we would request the court to
18 reconsider its ruling that these documents come in, Your Honor.

19 THE COURT: Ms. Siskind, I want to get a very clear
12:31 20 understanding of how you will use this information and what
21 you're saying with respect to the date shown in the screen shot.

22 MS. SISKIND: First in terms of how we're going to use
23 them. The summary charts that are page 1 of Exhibit 69, page 1
24 of Exhibit 71, that is the primary way in which we are going to
12:32 25 use these screen shots: To support Agent Cook's testimony about

1 how he arrived at a calculation of unreported income, and how he
2 arrived at a calculation of the high balance in the account.

3 So the summary charts in Exhibit 69 and 71 are
4 followed by the underlying documents. So it's to support how he
12:32 5 came to certain calculations.

6 THE COURT: But you do concede that the summary chart
7 is inaccurate at this point.

8 MS. SISKIND: As far as the government knows of
9 Mr. Kirsch -- not the table in our pleading last night. The
12:32 10 summary charts in our exhibits. It's two different things.

11 THE COURT: All right.

12 MS. SISKIND: The table we prepared last night was
13 prepared for last night to provide the court with corroboration
14 as to the screen shots. The table in our motion is nothing we
12:32 15 intend to use in that form at trial. What we intend to use is
16 what has an exhibit sticker on it that says 69 and what is
17 stickered as 71.

18 THE COURT: All right. Okay.

19 MS. SISKIND: As far as the date on the documents,
12:33 20 Ms. Katju testified that these screen prints came from a
21 computer system. Your Honor can see just from what this looks
22 like, there's a file menu, an edit menu. This is a screen shot.
23 There's a date on this document. The inference to be drawn from
24 that is that is the date that was sitting on the computer -- if
12:33 25 a person was sitting at the terminal that day, that is the date

1 that appeared on the screen. That establishes that this record
2 was created on or about the date that appears on here.

3 And when I say "this" record, I mean the screen shot.
4 There is a difference between on what date somebody inputted
12:33 5 information into a computer and on what date a screen shot was
6 prepared. The question of when these screen shots were prepared
7 I think is answered by the date on the document unless there is
8 some evidence that the computer system had a mistake on the date
9 and there's been no testimony -- while there has been testimony
12:33 10 about the subject of the screen shots, there's been no
11 indication that the dates in the HSBC computer are some way
12 unreliable.

13 There's a date on this document --

14 THE COURT: So just to simplify matters, the
12:33 15 government will only argue that the screen shot reflects the
16 status of those accounts or CDs as of the particular date that
17 is set out in what is pictured.

18 MS. SISKIND: Yes, Your Honor.

19 THE COURT: All right.

12:34 20 MS. SISKIND: And I do just want to make clear for the
21 court so I'm not misrepresenting our position, these screen
22 shots underlie Agent Cook's calculations. But to the extent the
23 defendant has written e-mails or letters in which he refers to
24 account numbers or CD numbers on these documents, we would offer
12:34 25 those letters from the defendant.

1 For example, Exhibit 82 being the prime example. That
2 is a letter in which the defendant refers to several CD numbers
3 that also make an appearance on the screen shots. The
4 government will be offering that evidence to show that --

12:34 5 THE COURT: Or he makes reference to numbers that
6 appear in the screen shots.

7 MS. SISKIND: He calls them CD numbers in Exhibit 82.
8 The fact that he calls them CD numbers and a bank record calls
9 them account numbers I don't think makes a difference as to what
10 they are.

11 But we would argue to the jury that based on the
12 letter he wrote to the bank in Exhibit 82, he was aware that
13 certain CDs that are reflected in these screen shots existed.
14 So it's not that we're using the screen shots to prove he
12:35 15 actually saw them because it says "inquiry by customer;" but the
16 inference from the fact that he refers to information that is
17 contained in those screen shots, the jury could conclude that he
18 was familiar generally that he had foreign bank accounts and
19 that those accounts are the subject of these screen shots.

12:35 20 THE COURT: All right.

21 MR. KIRSCH: Your Honor, just very briefly. The
22 government's argument just now sets out -- sets forth why these
23 documents are not admissible under 807. The government has sort
24 of turned its argument on its head. They're now arguing that
12:35 25 the screen shot -- that what you're looking at -- we don't know

1 this to be true, this is what the government is arguing based on
2 what Ms. Siskind, I quote, "from what this looks like," end
3 quote, is -- if you look at a screen shot, I'm looking at --
4 just so we're on the same -- the exact same page, I'm looking at
12:36 5 HSBC-DOJ-27737. And that's the third page of Government
6 Exhibit 71. And there's a date up at the top that says January
7 3, '06.

8 And Ms. Siskind is now suggesting to the court that
9 that date is the date on which the screen shot was prepared. So
12:36 10 Your Honor, if that is in fact the date on which the screen shot
11 that the snapshot occurred and took place, there is absolutely
12 no evidence in the record -- none, none -- that the information
13 contained in the screen shot as to when it was put in or when
14 the information in the screen shot was created. There's none.

12:37 15 THE COURT: The government is not suggesting that this
16 screen shot reflects when the information was created. What I
17 understand the government has said is, this screen shot reflects
18 what was displayed on bank terminals with respect to these
19 matters on the date mentioned, that is, January 3rd of 2006.

12:37 20 MR. KIRSCH: I agree. And because -- and now we're
21 back to Friday's argument. Because the government has no
22 evidence as to when the information in the screen shot was
23 created --

24 I mean, if you take a newspaper article without any --
12:37 25 without any date on it. So you got a newspaper article. And

1 you take a picture of a computer. And the picture of the
2 computer is taken today's date. And it says -- I don't know, it
3 says "Cardinals win the World Series." And then you try to
4 argue, well, the Cardinals won the World Series on August 13th,
5 2012 because that's what the screen shot says, we don't have any
6 information as to when that information was inputted, whether it
7 was accurate at the time it was inputted into the computer.

8 So all we know is we take a picture of the screen shot
9 on today's date. That's the hearsay problem. And that's the
10 problem that the court correctly identified on Friday. The
11 government has no evidence as to when that information contained
12 in the screen -- forget the fact that it's a screen shot for a
13 minute. They have no -- if it was any other document other than
14 a screen shot it doesn't matter that it's a screen shot. That's
15 my point, Your Honor. The fact that it's dated January 13th,
16 2006 or January 3rd, 2006 under the government's argument is
17 irrelevant. Because they can't -- they can't get past the
18 hearsay exception by arguing that this information was inputted
19 at the time by somebody with knowledge. They have no idea how
20 the information was put in.

21 THE COURT: Well, as we discussed earlier and at the
22 time I made my decision under the residual hearsay rule, there
23 are indicia of reliability that include the fact that Ms. Katju
24 and the records custodian indicated for the record the
25 regularity with respect to which these materials are utilized by

1 HSBC. And, in particular, Ms. Katju testified that while in
2 India, and later while in the United States, especially during
3 her period of employment in the New York office, she and her
4 colleagues used screen shots to convey information to customers
12:40 5 in response to customer inquiries and that they interpreted
6 these screen shots rather than having junior associates in India
7 interpret the screen shots so that they could be as accurate as
8 possible in advising customers respecting their various
9 accounts.

12:40 10 It's pretty apparent from what is in the record that
11 the accuracy of the screen shots was something that was relied
12 upon by the NRI employees in communicating with customers. And
13 so, this is not as you suggest. This is not a case where you
14 have a mere screen shot without further testimony or explanation
12:41 15 with regard to the dates and times. This is not a case of
16 someone saying I saw a computer screen that said something about
17 the Cardinals in 2011.

18 So the court's ruling stands. The screen shot
19 information can be utilized. I don't believe that the
12:41 20 inaccuracies in the brief are determinative.

21 Is there anything further?

22 MR. KIRSCH: Your Honor, I'm also referring to the
23 accuracies in the screen shots as reflected in the defense
24 exhibits, not just the --

12:41 25 THE COURT: You mean the government's exhibits?

1 MR. KIRSCH: No. We have exhibits that we attached to
2 our brief at Exhibits D and E that are e-mails that suggest that
3 screen shots are inaccurate. And, of course, we're at a huge
4 disadvantage here because Ms. Katju never testified about these
12:42 5 screen shots. She's never seen them. All she can testify is
6 about screen shots that she used when she was in India, and she
7 was in the United States at this time.

8 But we have, in page 3 of 4 of Government's Exhibit D,
9 for instance -- it's very hard to prove a negative, Your Honor,
12:42 10 but we did the best we could. And in Exhibit C, page 3 of 4,
11 right in the middle of the page, there's an e-mail that says
12 "Srini, I refer to my below mail for correction to place" --

13 THE COURT: Hold on, please. I have to make sure I
14 know what you're referring to. Exhibit C of Government
12:42 15 Exhibit -- of government brief 135?

16 MR. KIRSCH: No, no. This is our brief, Your Honor.
17 It's document 135. Defendant's 135. Exhibit C. Or, I'm sorry,
18 Exhibit D is one example.

19 And then if you go to page 3 of 4 of the document,
12:43 20 page 2 of the e-mail. And it talks about how mistakes were
21 made.

22 THE COURT: Hold on, please. Page 3 of 4. Okay.

23 MR. KIRSCH: And if you start down at the bottom of
24 the page, it's an e-mail to Jaya, "one of the deposits." And
12:43 25 it's making changes. And then it's a follow-up e-mail. And

1 Exhibit E is the same way. Exhibit E is an e-mail that says "As
2 requested, please find the screen shot of J93."

3 THE COURT: One second, where are you?

4 MR. KIRSCH: Page 1. Down at the bottom. "As
12:44 5 requested, please find the screen shot of J93." And then the
6 response is: "FYI only... will crosscheck and confirm."

7 THE COURT: One second. Just for the record you're
8 referring to Exhibit document 135-5, page 2 of 4, correct?

9 MR. KIRSCH: Yes, Your Honor.

10 12:45 THE COURT: All right, go ahead.

11 MR. KIRSCH: And then right in the middle of the page
12 after printing the information on the screen shot it says "Will
13 crosscheck and confirm if they've done them correctly." And if
14 the information was always inputted correctly and the screen
12:45 15 shots were always prepared correctly, there would be no reason
16 or need to check and confirm that they've done them correctly.

17 And it's very, very difficult to prove a negative.
18 Very difficult. But these two e-mails, if nothing else, suggest
19 that the information contained in the screen shots may not have
12:45 20 always been reliable and relied upon.

21 And again, I think it's of vital importance.
22 Ms. Katju, if you just look at the record, she's never -- she's
23 testifying to the reliability, and the court's relying on her
24 testimony to establish the reliability of documents she's never
12:45 25 seen. I think I asked her "you don't know if they're in Spanish

1 or German," and she said "I don't know. I don't know."

2 (Brief pause.)

3 THE COURT: For the record, I'm looking at pages 7, 8,
4 9 through 12 of the defense brief 135.

12:51 5 (Brief pause.)

6 THE COURT: Can the government comment on these
7 exhibits, in particular, the e-mails referred to in the defense
8 brief, pages 2, 3, and 4 of the attachment?

9 MS. SISKIND: Yes, Your Honor. Exhibits D and E to
12:52 10 the defendant's motion are e-mail chains that purport to show
11 inaccuracies in HSBC bank records.

12 I would first note that the inaccuracies at issue
13 aren't with respect -- they're with respect to an interest rate,
14 whether the client was entitled to a higher interest rate than
12:52 15 what he was the actually getting.

16 The second issue is, I didn't see anything in the
17 defendant's brief suggesting that these e-mails relate to any
18 inaccuracies on the screen shots the government is offering in
19 Exhibits 69 and 71. So that does not tend to undermine the
12:52 20 reliability of the particular screen shots the government is
21 introducing.

22 And the third point I would make, Your Honor, is
23 neither Rule 803(6) nor 807 require a standard of perfection in
24 the records that the party is seeking to introduce. The
12:53 25 standard under 807 is whether the records contain circumstantial

1 guarantees of trustworthiness. And the court made extensive
2 findings this morning on all of the evidence the government has
3 presented to establish the reliability and the trustworthiness
4 of these documents. And the fact that even if these e-mails do
12:53 5 show that a mistake was made at some point -- and I'm not
6 conceding and I'm not suggesting that is what they show --

7 THE COURT: What, if anything, are you saying they
8 show?

9 MS. SISKIND: Well, it appears that the 135-4, which
12:53 10 is Exhibit D, tends to show that the customer was given a
11 7.5 percent interest rate when, in fact, he should have gotten a
12 10.5 percent interest rate. That doesn't necessarily show that
13 any of the information on any of the government's screen shots
14 is inaccurate.

12:54 15 The defense has not been able to tie these alleged
16 inaccuracies in Exhibits D and E to any screen shot that the
17 government is trying to introduce. That, coupled with the fact
18 that the standard is trustworthiness not infallibility or
19 perfection of the records, these e-mails do not undermine the
12:54 20 reliability and the court's earlier findings today are
21 sufficient to establish the records of admissibility on under
22 807.

23 MR. KIRSCH: Your Honor, if I can respond.

24 THE COURT: Surely.

12:54 25 MR. KIRSCH: Now, Your Honor, now we're clearly,

1 clearly within the scope of Idaho vs. Wright. This is the road
2 that Idaho vs. Wright the Supreme Court tells us we should not
3 go down, and this is the reason.

4 In Idaho vs. Wright the Supreme Court in 1990 said,
12:54 5 and I quote: "We are unpersuaded by the State's contention that
6 evidence corroborating the truth of a hearsay statement may
7 properly support a finding that the statement bears
8 particularized guarantees of trustworthiness. Hearsay evidence
9 used to convict a defendant must possess indicia of reliability
12:55 10 by virtue of its inherent trustworthiness, not by reference to
11 other evidence at trial."

12 The government is trying to point to other evidence in
13 trial while now conceding, well, they might not be inherently
14 trustworthy, because mistakes clearly were made. It's not our
12:55 15 burden to prove a negative. It's not our burden to show that
16 these documents are false or they're wrong or they're
17 inaccurate. The whole point, Your Honor, is, we can't. I mean,
18 you can't prove a negative. The government wants to use them to
19 show that they're accurate, but we have two instances --

12:55 20 In this e-mail which the court correctly identified,
21 which is document 135-4, page 3, right in the middle of the
22 e-mail there's -- right in the middle of the page there's an
23 e-mail that says, "Srini, I refer to my below mail for
24 correction, to place 278 and 279." And then it goes on and it
12:56 25 talks, "If you see the below screen shots that 278 and 280 are a

1 14.3 lacs and 16 lacs respectively and 279 is not existing at
2 all." And then she's requested, "Please do the following: Send
3 us confirmation with the J93 screen dumps showing the correction
4 as requested."

12:56 5 So we're now beyond. I don't think the court should
6 go beyond Idaho vs. Wright. But once we go beyond Idaho vs.
7 Wright in this case and we start trying to corroborate the
8 statements with other evidence -- we're, first of all, beyond
9 what the Supreme Court said we could do, but in this case the
12:56 10 government can't even do that.

11 And I think the court was absolutely correct to look
12 at paragraphs -- I'm sorry, pages 7 through 13 of our brief.
13 Because even if the court finds that Rule 807 does not say what
14 the defense position says it says, even when you get beyond that
12:57 15 and you talk about guarantees of trustworthiness, the government
16 wants to focus on circumstantial guarantees of trustworthiness.
17 But, Your Honor, 807 unequivocally states equivalent.
18 Equivalent. And they can't establish 806. Now we've
19 established that the screen shots may be wrong. We've
12:57 20 established that we shouldn't even be looking at the screen
21 shots. And the government -- we've established --

22 THE COURT: Wait a minute.

23 MR. KIRSCH: I'm sorry.

24 THE COURT: How have we established that we should not
12:57 25 be looking at the screen shots?

1 MR. KIRSCH: I misspoke. I meant we should not be
2 looking at evidence to corroborate what's in the screen shots.
3 Under Idaho vs. Wright the Supreme Court has said don't do that,
4 that's not what it's about.

12:57 5 And so we look at 803(6), they can't establish 803(6).
6 But when we look at the screen shots themselves we've
7 established that there could be errors in the screen shots.

8 THE COURT: But let me interrupt to ask you: Doesn't
9 the information you point to indicate that there was an
12:58 10 obligation on the part of bank employees to accurately record
11 the information pertaining to a customer's account and an
12 ongoing effort on the part of the bank to correct any errors
13 that may occur?

14 MR. KIRSCH: Your Honor, respectfully, I would suggest
12:58 15 that even if it does go that far to suggest that, it suggests
16 that in instances it didn't happen. That's the problem. And
17 there's no testimony on this from anybody at HSBC. Even if bank
18 employees were required to input the information, there's no
19 indication that there is this indicia of reliability with the
12:59 20 information contained in this screen shot. Because we don't
21 know when it was inputted. We've had no testimony about these
22 particular screen shots that any witness has ever laid eyes on
23 them. So they just don't have the indicia of trustworthiness.

24 And for the court to ask that question I think
12:59 25 demonstrates the leap that we would have to take to find that

1 the documents have the indicia of trustworthiness to put them in
2 evidence.

3 I mean, you could suggest in every single instance in
4 every single case people are supposed to or record information
12:59 5 correctly, but they don't always do it. And that's why hearsay
6 statements are routinely kept out. Because that's why 803(6)
7 exists, because there have to be these guarantees of
8 trustworthiness. And what are they? They're at, made or by the
9 time with a person with knowledge, and you have these guarantees
01:00 10 in indicia of trustworthiness.

11 But here we've demonstrated that these records don't
12 even have that. Now, we can't point to -- I mean, obviously if
13 we could point to every line and we could say this line is
14 false, that line is false, that line is false, we'd never be
01:00 15 here. But that's not the test. That's not our burden. It's
16 the government's burden to prove that they have indicia of
17 reliability. They've tried to do it through a witness who
18 hasn't seen the documents. And now we've submitted evidence to
19 the court that suggests that these screen shots aren't always
01:00 20 accurate. And in some instances there were bankers that may
21 have caught the mistake and said that it should be corrected.
22 But that's not the test. The test is was it input -- was it
23 inputted accurately so that we can rely on it.

24 Your Honor, we don't even know how it was inputted,
01:00 25 let alone that it was inputted accurately. And now we know in

1 some instances it wasn't even inputted accurately. And the
2 government is -- I mean, I guess this issue is even crystalized
3 by the fact that the government has said this evidence is so
4 important that they can't go to trial without it.

01:01 5 And to allow them to put this in evidence and do what
6 they're going to try to do from this evidence, Your Honor, I
7 don't think it's appropriate under 807, I don't think it's
8 appropriate under 803, and I think our brief points out all the
9 reasons why they have not met the exceptional circumstances test
01:01 10 of the Seventh Circuit, at least in pages 7 through 13.

11 THE COURT: Can you go back for a moment and give me a
12 pinpoint cite within Idaho vs. Wright that you were looking to?

13 MR. KIRSCH: Sure, Your Honor. I was looking at
14 page 823.

01:02 15 THE COURT: Okay. Hold on.

16 MR. KIRSCH: And 822, Your Honor. And I can tell you
17 what I was looking at if you'd like me to read it.

18 THE COURT: One second. I have the page up.

19 MR. KIRSCH: There's two statements, one -- on 823
01:02 20 there's the word "bootstrapping," which I suggest is what the
21 government's trying to do. And then on page 822 begins "we are
22 unpersuaded by the state's contention."

23 And then there's also Seventh Circuit law, Huff vs.
24 Wright Motor Corp., which holds the same thing. And I can give
01:02 25 the court a cite if it wants it.

1 THE COURT: One second, please.

2 (Brief pause.)

3 THE COURT: What's the other cite?

01:03 4 MR. KIRSCH: Are you talking about in Idaho vs. Wright
5 or the Seventh Circuit?

6 THE COURT: Seventh Circuit.

7 MR. KIRSCH: The Seventh Circuit, Your Honor, is
8 609 F.2d 283 -- I'm sorry, 286 at page 293. And the relevant
9 quote is: "The probability that the statement is true as shown
01:03 10 by corroborative evidence is not, we think, a consideration
11 relevant to the admissibility under the residual exception to
12 the hearsay rule. Because the presence or absence of
13 corroborative evidence is irrelevant in the case of a specific
14 exception, it is irrelevant here where the guarantees of
01:04 15 trustworthiness must be equivalent to those supporting specific
16 exception."

17 And that's consistent with Judge Easterbrook's opinion
18 which was more recently in the case of United States vs. Dent.
19 And I'd like to provide the cite for that case, too, if I can,
01:04 20 Your Honor.

21 THE COURT: Go ahead.

22 MR. KIRSCH: 984 F.2d 153-165 -- I'm sorry. 1453,
23 and then the page cite is 1465 through 66. In that case the
24 Seventh Circuit had found that the court -- the district court
01:04 25 correctly rejected the hearsay as untrustworthiness and never

1 reached the 807 issue. But Judge Easterbrook, urging the court
2 to do so, concurred and wrote a concurring opinion that says:

3 "The residual hearsay exception reads more naturally
4 if we understand the introductory clause to mean that evidence
01:05 5 of a kind specifically addressed covered by one of the other
6 exceptions must satisfy the conditions laid down for its
7 admission, and that other kinds of evidence not covered, because
8 the drafters could not be exhaustive, are admissible if the
9 evidence is approximately as reliable as evidence that would be
01:05 10 admissible under the specific exceptions."

11 So Judge Easterbrook has adopted our position which is
12 consistent with Idaho vs. Wright and consistent with Huff vs.
13 White Motor Corp., which is the position that the government has
14 asked the court to do, which is judge the reliability of the
01:06 15 screen shots based on corroborating evidence, is not the test.
16 It's not what -- it's not the decision that should be made.

17 And Your Honor, but we go farther than that because --

18 THE COURT: Well, let me say that in determining
19 whether or not the screen shots are admissible in this case I
01:06 20 wasn't looking at other corroborative evidence except to the
21 extent that there was testimony and other proof concerning the
22 way in which HSBC operates and the way that the information in
23 the screen shots has been utilized by HSBC and its employees,
24 especially in the New York office over the years.

01:06 25 It's apparent from what's in the record that the

1 accuracy of the screen shots was something that was of concern
2 to HSBC. And as your brief and the e-mails you point out
3 indicate, there certainly was a desire and effort on the part of
4 HSBC and its employees to correct anything that was erroneous.
01:07 5 And in the instance of the matters you pointed out, they were
6 concerned about the interest rate that was reflected and about
7 the business of correcting the inaccurate entry respecting the
8 interest rate. But, again, the decision did not rely upon some
9 unrelated testimony or evidence in the record to bootstrap
01:08 10 whether or not the residual hearsay rule could be employed to
11 admit the screen shots 69 and 71.

12 So at this stage the court sees no reason to alter its
13 ruling respecting the screen shots.

14 MR. KIRSCH: Subject to the redactions, I assume,
01:08 15 Your Honor.

16 THE COURT: Subject to the redactions which, of
17 course, the government acknowledges is required with respect to
18 inquiry by customers. By customer.

19 MR. KIRSCH: And what about account number,
01:08 20 Your Honor?

21 THE COURT: I think that that should still be
22 included. I don't see any reason why account numbers should be
23 excluded. And the government isn't suggesting that an account
24 number should be excluded. Now, there may be a reference to a
01:09 25 CD in a letter attributed to your client, but that doesn't mean

1 that the screen shot should be excluded on any ground.

2 MR. KIRSCH: Well, Your Honor, I was asking that
3 because of what the government wrote in its brief that -- they
4 write in their brief that the screen shots establish the
01:09 5 defendant had bank accounts in India with HSBC and the defendant
6 was aware of the existence of those accounts.

7 These screen shots don't -- they never -- there's not
8 one piece of evidence that ever suggests that these ever went to
9 the defendant and that he was ever aware from the existence of
01:09 10 these screen shots --

11 THE COURT: Well, that's another matter. That doesn't
12 relate to whether or not the screen shot as a piece of evidence
13 --

14 MR. KIRSCH: Right.

01:09 15 THE COURT: -- should be admitted. What you're
16 arguing is that the government should not be able, at the end of
17 the day, to argue as you've indicated. That's a totally
18 different matter.

19 Now, there may be nothing else in the record to
01:10 20 support an argument like that and we'll certainly have to see,
21 but I'm not going to predict at this moment in time that the
22 government is unable to tie everything together.

23 Does the government wish to be heard? I see a
24 quizzical look.

01:10 25 MR. SULLIVAN: Your Honor, there's one other issue

1 that needs to be addressed after all this is settled. So if you
2 can give the signal when it's over with I'll raise that issue.

3 THE COURT: Do you want to say anything else
4 concerning the screen shot? And let me just add, ordinarily
01:10 5 during trial if a lawyer handles an issue that lawyer will be
6 the only one for that side handling an issue. But now you have
7 latitude.

8 MR. SULLIVAN: Your Honor, I don't want to say
9 anything about the screen shots. I was going to try -- I was
01:11 10 going to make a comment about what to argue but that's so
11 premature it would be a waste of time right now.

12 THE COURT: All right.

13 MR. SULLIVAN: What to argue at trial, I mean.

14 THE COURT: All right. Are we done with any argument
01:11 15 from the government concerning screen shots?

16 MS. SISKIND: Yes, Your Honor.

17 THE COURT: All right. That matter has been resolved
18 for the moment.

19 MR. SULLIVAN: Your Honor, may I be heard?

01:11 20 THE COURT: Absolutely.

21 MR. SULLIVAN: Then the issue is what to do with count
22 one. And I am happy to report that I have authorization to move
23 to dismiss count one, but I don't want to do it right now today.
24 But I will represent to the court and to the parties -- if
01:11 25 the -- if Dr. Ahuja agrees, because under the rule if we move to

1 dismiss a count the defendant I think has to agree -- or no, the
2 court has to --

3 THE COURT: Grant you leave to dismiss.

4 MR. SULLIVAN: Right. And assuming that everyone
01:12 5 agrees that we want to do this, I would like to do it right
6 before we pick the jury. And we don't have to -- it should be
7 pro forma, but I just wanted to make that --

8 THE COURT: All right.

9 MR. WEBB: Your Honor, could I just raise one issue?
01:12 10 And I saw you look at the hour.

11 THE COURT: Yes. I certainly want to give you time
12 for lunch, and we can break and resume if it's necessary to do
13 so. If there is nothing else that we need to resolve or
14 something we can attend to within a couple moments then we'll do
01:12 15 that instead.

16 MR. WEBB: I only have one issue which I think --

17 THE COURT: Please stand close to a microphone.

18 MR. WEBB: I'm sorry. I apologize.

19 We really haven't -- I have not had the pleasure of
01:12 20 picking a jury in Your Honor's court, can we walk through
21 briefly the process that you follow with voir dire?

22 THE COURT: Let's do that off the record.

23 MR. WEBB: Yes, we'll do that off the record. And the
24 answer is yes. I have nothing else.

01:13 25 THE COURT: All right. For the record we have

1 concluded our discussion of issues related to the evidence in
2 the case, and at this point the court will review with parties
3 some of the logistical matters concerning the trial. If there
4 are issues that arise during the course of that off-the-record
5 discussion we will go back on the record and try to resolve
6 those issues.

01:13

7 We are in recess.

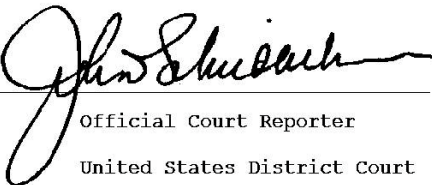
8 (Trial adjourned for an off-the-record discussion in
9 the jury room at 1:13 p.m.)

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1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF WISCONSIN
3

4 I, JOHN T. SCHINDHELM, RMR, CRR, Official Court
5 Reporter for the United States District Court, Eastern District
6 of Wisconsin, do hereby certify that I reported the foregoing
7 proceedings, and that the same is true and correct in accordance
8 with my original machine shorthand notes taken at said time and
9 place.

10 Dated this 13th day of August, 2012
11 Milwaukee, Wisconsin.

12 
13 _____
14 Official Court Reporter
United States District Court